

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1078 ORIGINAL

To be argued by
JOSEPH DELMAN

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In The
United States Court of Appeals
For The Second Circuit

NARCIZA LOPEZ,

Plaintiff- Appellee.

vs.

HENRY PHIPPS PLAZA SOUTH, INC.,

Defendant - Appellant.

*Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court have jurisdiction over the subject matter of this action in view of the existence of a State remedy for redress?
2. Should the District Court have exercised jurisdiction over the subject matter of this action in view of the existence of a State remedy for redress?
3. Did the plaintiff-appellee have a property right accorded protection by the due process clause of the United States Constitution?
4. Was the plaintiff-appellee accorded due process by the defendant-appellant?
5. May the District Court exclude from consideration the acts of one of the tenants?
6. Does due process require the holding of a hearing on rehabilitation between the date of the decision not to renew a lease and the date of a final judgment of eviction?
7. Has the District Court acted in excess of its powers and undertaken determination of issues not before it and of issues which were resolved by the hearing officer?
8. Was the action properly reassigned in view of the purpose and intent of the rules of the District Court?

PRELIMINARY STATEMENT

The decision and order appealed from were made by Judge Thomas P. Griesa of the United States District Court for the Southern District of New York. As far as known to appellant, neither the decision nor supporting opinion has been reported.

STATEMENT OF THE CASE

This is an appeal from an order continuing a temporary injunction in an action for a permanent injunction brought by a tenant of a housing development owned by the defendant. The housing development was afforded mortgage insurance under Section 236 of the National Housing Act and is subject to regulation by the Federal Housing Administration as an arm of the United States Department of Housing and Urban Development (Lease, Appendix Page 14).

After the expiration of the lease between the defendant, as landlord, and the plaintiff and her husband, as tenants, the defendant informed the tenants of its preliminary decision not to renew their lease based upon various reasons set forth in a letter from the defendant to the tenants dated January 12, 1973 (Appendix Page 19). In that same letter, the tenants were informed of their right to a review, to a hearing, to be represented by counsel and to present witnesses. There was a sub-

sequent letter from the defendant to the tenants furnishing them with copies of papers in the landlord's files upon which it intended to rely and identification of witnesses whom the landlord intended to present and informing tenants' attorney of the right to cross-examine and confront witnesses (Appendix Page 42) and a supplemental letter containing additional charges (Appendix Page 44). Hearings were held on February 27, 1973, March 6, 1973 and May 2, 1973 (Decision, Appendix Pages 22, 23 and 31).

On July 10, 1973, the hearing officer made his decision that the refusal to renew the lease was neither arbitrary nor capricious and was supported by substantial evidence. He found proven, six serious and substantial charges which would constitute a danger to the health, safety and well-being of the other occupants of the development. Those charges include an assault by plaintiff's husband on two security guards while drunk and armed with a knife; an attempt by the tenants' two children to gain entry to another tenants' apartment; disorderly conduct in that the tenants were breaking and throwing objects; the arrest of one of the tenants' children, age 17, for felonious burglary and felonious criminal mischief; the arrest of the same son for burglary, criminal possession of a dangerous instrument and menacing in a burglary involving a gunshot wound at the subject premises and a grand jury in-

dictment of that son therefor; the arrest of the other son arising out of the same incident with an adjudication of juvenile delinquency and a prior arrest of that other son for possession of a loaded fire arm and a bunch of knives, drug addiction and further arrests of both sons; and the arrest of plaintiff's husband on a charge of reckless endangerment, possession of a dangerous instrument and resisting arrest in attempting to grab a security guard's gun and attempting to assault a security guard with a knife while publicly intoxicated (Decision, Appendix Pages 22-35). The determination of the hearing officer was based upon official records subpoenaed to the hearings, including records of the Communications Division of the Police Department of the City of New York (Appendix Pages 46-50), Police Arrest Records (Appendix Pages 51-53) and a complaint in the Criminal Court of the City of New York (Appendix Page 54). In addition, at the hearing of May 2, 1973, Patrolman Cusker of the Police Department of the City of New York was present and testified to an arrest of the two sons of the plaintiff during the commission of a burglary in a book store at the premises, the shooting of one of the sons who pointed a gun at the police officer, and prior arrests on drug charges with reference to the two sons (Appendix Pages 30-31).

On July 16, 1973, defendant served upon the tenants a 30 day notice terminating the tenancy of the tenants as required

under the provisions of the Real Property Law of the State of New York for monthly tenants. The tenancy was terminated effective August 31, 1973, the earliest date coinciding with the end of a rental period as required by law (Appendix Page 56). Holdover proceedings to evict the tenant were commenced in the Civil Court, New York County, on September 11, 1973 and the matter was set by the Clerk of the Court for hearing on September 20, 1973 (Appendix Pages 12 and 56).

On September 19, 1973, the parties appeared before Judge Kevin T. Duffy of this Court for argument of plaintiff's application for a stay of eviction pending the hearing of her motion for a temporary injunction and the determination of her action for a permanent injunction. The stay was denied by Judge Duffy off the bench after hearing both sides, the provisions for the stay were stricken by him from the Order to Show Cause and the motion was made returnable on October 2nd, 1973 (Appendix Pages 3 and 4).

On September 20, 1973, a final judgment of possession was awarded to the defendant against the tenants with a stay of the warrant to September 30, 1973 (Appendix Page 55). Since a 72 hour notice before eviction is required, the tenants could not be and were not evicted prior to the return date of the motion (Real Property Actions and Proceedings Law, State of New York, Section 749 (2)). Thereafter, they were not evicted

until the argument of the motion was completed, at the request of the Court.

On October 2, 1973, the return date of the motion, Judge Duffy had been succeeded in the motion part of this Court by Judge Griesa. After hearing extended argument, Judge Griesa, on October 4, 1973, off the bench, dictated his decision which determined that the only additional due process requirement which the Court felt should be imposed was a further hearing, conducted in the same manner as the prior hearings, "as to the current situation existing with respect to Plaintiff Lopez and her children." (Appendix Page 82). By order made October 9, 1973 and entered October 11, 1973, a preliminary injunction against eviction of the tenants was granted for a period of 45 days for the purpose of conducting such further hearing (Appendix Pages 84 and 85).

Plaintiff moved for an extension of that injunction (Appendix Pages 86 and 87). Although the action was assigned to Judge Cannella, Judge Griesa procured, on November 28, 1973, a reassignment of the case to him (Appendix Pages 1 and 99). The Court made its memorandum dated November 29, 1973, granting the motion and amending the prior order so as to delete the 45 day limitation (Appendix Pages 98-101) and an order to that effect was made and entered on January 9, 1974 (Appendix Pages 102 and 103).

This appeal followed:

POINT I

THE DISTRICT COURT EITHER LACKED
JURISDICTION OR, IF IT HAD JURISDIC-
TION, SHOULD NOT HAVE EXERCISED IT

Review of the determination of the hearing officer
was available to the plaintiff in a proceeding under Article 78
of the Civil Practice Law and Rules of the State of New York.

Tompkins Square Neighbors, Inc. v.
Zaragoza (App. T. 1st Dept., 1973)
73 Misc. (2d) 126, 341 N.Y. Supp.
(2d) 627, reversed on other grounds
(App. Div. 1st Dept., 1973) App.
Div. _____, 349 N.Y. Supp. (2d)
395. (Not yet officially reported)

Justice Aaron Steuer, of the Appellate Division,
First Department, has perhaps made the most trenchant comment
on the practice of the exercise of jurisdiction by the Federal
Court in matters where a state remedy exists.

"This raises a sore subject on which
I have tempted to say just a word. The
subject, namely, the assumption of
jurisdiction by the Federal courts of
traditionally local matters, has al-
ready been discussed publicly by two
of our ablest forensic masters-- Mr.
Justice McGivern, Presiding Justice
of the Appellate Division, and Judge
Mulligan of the Second Circuit Court.
While I lack the powers to compete
on even terms with either in the me-
dium in which both excel, I have the
temerity to advert to fact and reason.
It was common knowledge in legal, and
especially legal educational, circles,
that in the early 1920's Justices Holmes

and Brandeis directed their formidable research staffs to find a case where a state court had entered a judgment which was so completely wrong and the result so unjust that it would be proper for the Federal Bench to set it aside as contravening the Fourteenth Amendment's provision as to due process.

The Great Rights

"The legal consensus at that time was that such a case could not be found, because the plain mandate of the Amendment as directed to the states was to provide such procedures as would guarantee the great basic rights-- the right to counsel, to a complete hearing, and the full panoply of what Chief Justice Earl Warren called the great rights. Where the states so provided, that was the end of the matter as far as Federal intervention was concerned; and it was up to the state courts to see to it that their own provisions were effectuated in the individual case. That apparently is not the thinking today, and sundry District Court judges have not hesitated to rush in where the angels feared to tread.

"Today, it is the assumed prerogative of any Federal judge to upset a state court decision if the state court judge said "Overruled" when the Federal judge believes he should have said "Sustained"-- on the supposed ground that there was thereby a denial of due process. So much so that the latest boy wonder on court reform has advised the Bar to eschew the state courts in every matter and go into the Federal courts in the first instance. I can hardly believe that such practice will receive a hospitable reception, but if

restraint is not exercised the consequences may well be more than was anticipated." New York Law Journal, March 8, 1974, Page 5, Col. 1.

POINT II

THE PLAINTIFF HAD NO PROPERTY RIGHT ACCORDED PROTECTION BY THE DUE PRO- CESS CLAUSE

On June 29, 1972 the Supreme Court of the United States decided two appeals which have a direct bearing on this issue. They are:

Board of Regents of State Colleges v.
Roth (1972) 408 U.S. 564, 92 S. Ct. 2701.

Perry v. Sindermann (1972) 408 U.S. 593,
92 S. Ct. 2694.

In the Roth case, respondent Roth was a non-tenured teacher hired to teach at a state university for a fixed term of one academic year. He was informed, without explanation, notice or hearing, that he would not be rehired. Roth brought an action claiming infringement of his right of free speech and of his procedural right to due process. Roth was awarded summary judgment by the District Court upon the ground of deprivation of his procedural right to due process and the Court of Appeals affirmed. The Supreme Court reversed upon the ground that Roth did not show that he was deprived of "liberty or "property".

In the Sindermann case, respondent Sindermann had

been employed by a state college for ten years under a series of one year written contracts. The contracts provided no tenure but Sindermann alleged that there was a de facto tenure program after seven years of teaching based upon the college's Faculty Guide and guidelines promulgated by the Coordinating Board of the Texas College and University System. The Board of Regents, whom respondent had publicly criticized, voted not to renew his contract. Sindermann similarly alleged infringement of his rights to free speech and procedural due process, arguing as to the latter that he was entitled to a hearing. The District Court granted summary judgment to the Board of Regents on the ground that Sindermann was not tenured. The Court of Appeals reversed and remanded for a full hearing on the issues of whether the refusal to renew was in retaliation for Sindermann's criticism and whether Sindermann had an "expectancy" of re-employment entitling him to procedural due process. The Supreme Court affirmed expressing disagreement with the Court of Appeals as to whether a mere "expectancy" is protected by procedural due process.

Much of the significance and purport of these decisions can be gleaned only from a complete examination of the various opinions filed. In the Roth case, Justice Stewart delivered the opinion of the court joined by Chief Justice Burger and

Justices White, Blackmun and Rehnquist. The court noted that under Wisconsin law a teacher can acquire tenure only after four years service. A tenured teacher is entitled to a notice of charges and a hearing before discharge. Even a non-tenured teacher is entitled to a review of dismissal during the term of his academic year contract. However, rehiring of a non-tenured teacher is a decision left to the discretion of the university officials. The Court found that procedural due process applied only to the protection of liberty and property. It held that there was no showing of deprivation of liberty because the refusal to rehire cast no stigma upon Roth and left him free to seek another position. The Court then investigated the particular kinds of property rights entitled to due process protection. As an example, the Court referred to the rights of a person receiving welfare benefits to their continuance and in the process distinguishes *Goldberg v. Kelly* upon which the District Judge relied (Appendix Page 81). The Court stated:

"Just as the welfare recipients' 'property' interest in welfare payments was created and defined by statutory terms, so the respondent's 'property' interest in employment at the Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. These terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30.

They did not provide for contract renewal absent 'sufficient cause'. Indeed, they made no provision for renewal whatsoever.

Thus the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."

The language of the Court may be transposed, without alteration of meaning, to the facts to the case at bar, as follows:

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so Lopez's "property" interest in tenancy at Phipps Plaza was created and defined by the terms of the lease. Those terms secured their interest in the tenancy up to September 30, 1973. But the important fact in this case is that they specifically provided that Lopez's tenancy was to terminate on September 30th. They did not provide for lease renewal absent "sufficient cause". Indeed, they made no provision for renewal whatsoever.

Thus the terms of Lopez's tenancy secured absolutely no interest in renewal for the next year. They supported absolutely no possible claim of entitlement to renewal. Nor, significantly, was there any State statute or rule or policy of the landlord that secured their interest in renewal or that created any legitimate claim to it.

In these circumstances, Lopez surely had an abstract concern in being renewed, but they did not have a property interest sufficient to require the landlord to give them a hearing when the landlord declined to renew the lease.

The Supreme Court thus held in the Roth case that no sufficient showing was made by Roth warranting the grant to him of summary judgment.

In the Sindermann case, Justice Stewart again delivered the opinion of the Court with the same justices joining as those who joined in the Roth case. In Sindermann the District Court awarded summary judgment against Sindermann, whereas in the Roth case the District Court awarded in favor of Roth. The Supreme Court in Sindermann affirmed the Court of Appeals reversal of the District Court's action. It held that Sindermann made a showing, sufficient to entitle him to a determination of the issue, that the refusal to renew his contract was in infringement of his right to free speech. The Court also held that Sindermann made a showing, sufficient to entitle him to an opportunity to prove the legitimacy of his claim, that he had a "property interest" in continuing employment which he could not constitutionally be deprived of without procedural due process. The Court expressly disagreed, however, with the opinion of the Court of Appeals that a mere "expectancy" of continued employment is protected by procedural due process.

The Court states in footnote 7 of its opinion as follows:

"If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated."

Again the language of the Court may be transposed, without alteration of meaning, to the facts of the case at bar, as follows:

If it is the law of New York that a tenant in Lopez's position has no contractual or other claim to renewal, Lopez's claim would be defeated.

Of course, it is the law of the State of New York, in the absence of constitutional grounds, that a tenant whose lease has terminated has no claim to renewal.

Chief Justice Burger, in a single concurring opinion for both cases, underscored the point of the Court's opinion that whether there is a "property interest" to be protected is a question of state law. It is only when such interest exists under state law that a right to procedural due process is to be afforded.

Justice Douglas dissented in the Roth case and would affirm the grant of summary judgment both on the ground that there was an infringement of the right of free speech and on the ground that non-renewal of a teacher's contract is an "important interest" entitling Roth to procedural due process.

Justice Marshall dissented in the Roth case and

would affirm upon the ground that any governmental employee is entitled to procedural due process for a denial of employment. For the same reason Justice Marshall dissented in the Sindermann case to the extent of modifying with a direction to enter summary judgment for Sindermann.

Justices Brennan and Douglas joined in Justice Marshall's dissent in the Sindermann case and Justice Brennan joined with Justice Douglas' dissent in the Roth case.

Justice Powell took no part in either decision.

We respectfully submit that the Supreme Court of the United States has made it clear that the plaintiff, Lopez, has no property right or interest which entitles her to procedural due process.

POINT III

THE PLAINTIFF WAS AFFORDED ALL OF THE ELEMENTS OF DUE PROCESS

There is no necessity for extended argument that due process was afforded in view of the District Court's finding that the only additional requirement was a rehabilitation hearing.

The basis for the grant by the Court of the relief requested was the contention that the acts of the tenant, Thomas Lopez, husband of the plaintiff, could be disregarded and that the other occupants may have been rehabilitated.

To our knowledge, no one has ever contended that the acts of one of the tenants may be disregarded in determining whether the lease of the tenants should be renewed. Even where the charges are based on the acts of an occupant who is not a tenant, the Court has sustained a refusal to renew.

Portuguez v. Golar (Sup. Ct. N.Y.
Co., 1973) 349 N.Y. Supp. (2d) 254
(Not officially reported)

It is sufficient, to refute the Court's contention that after three prior hearings due process requires a further hearing on rehabilitation, to say, as was said by the Supreme Court of the United States --

"Due process does not, of course,
require two hearings." Goldberg v.
Kelly 397 U.S. 254, 90 S. Ct. 1011,
25 L. Ed. (2d) 287

It has been the impression that the purpose of the Individual Assignment Rules of the District Court requiring the selection of the Judge by lot was intended to preclude, except in the most exceptional circumstances, the assignment of particular cases to particular judges whether at the behest of counsel or of the Court. Rule 1 provides that the method of selection "shall be such that the name or other means of identifying the judge to whom an action or proceeding is to be assigned or transferred shall not be known or disclosed to anyone until after the name of the judge to be assigned has been drawn by lot in accordance with these rules."

This case was assigned to Judge Cannella. In his absence, because of illness, Judge Duffy determined the initial application for restraint. Because of the continued absence of Judge Cannella, Judge Griesa, then presiding in the motion part, determined the motion for a temporary injunction. However, at the time the motion for an extension or continuance of the injunction was made, Judge Cannella had returned to the Court and was available and Judge Griesa was no longer sitting in the motion part. The case was reassigned, at Judge Griesa's request, by Judge Cannella to Judge Griesa. Counsel for the defendant objected on the ground that proper procedure required that the motion either be heard by Judge Cannella or, in the event of his absence or disability, by the judge sitting in the motion part. It was as predictable that Judge Griesa would continue the injunction as it would be that Judge Duffy would refuse to continue the injunction.

Finally, if the Court senses a certain tinge of outrage in this brief, the Court is correct. A non-profit foundation attempting to create and manage decent and safe housing for persons of low or moderate income has been balked by the District Court in its attempts to fulfill its duties to remove a family whose occupants have been proven to be a danger to the development.

Due process does not require that a landlord renew the lease of tenants who go around armed with loaded guns and

knives, attempt assaults with dangerous weapons on security guards and police officers and repeatedly burglarize premises.

CONCLUSION

**THE ORDER EXTENDING AND CONTINUING
THE PRELIMINARY INJUNCTION SHOULD
BE REVERSED AND THE RELIEF DENIED**

Respectfully Submitted,

**WHITEHORN & DELMAN
Attorneys for Defendant-Appellant**

Joseph Delman
of Counsel

U.S. COURT OF APPEALS-SECOND CIRCUIT

Index No.

LOPEZ,

Plaintiff-Appellee,

against

Affidavit of Service by Mail

PHIPPS PLAZA SOUTH,

Defendant-Appellant.

STATE OF NEW YORK, COUNTY OF *NEW YORK*
I, LAUREL N. HUGGINS,

ss.:

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
*1050 CARROLL PL, BNX, N.Y.*That upon the *29th* day of *March* 19 *74*, deponent served the annexed *Appellants**Brief*upon *Nancy E. Leblanc*

attorney(s) for

Plaintiff-Appellee

in this action, at *214 East 2nd Street, New York, N.Y. 10008*purpose by depositing ^{*3*} *is* true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.Sworn to before me, this *28th*
day of *March* 19 *74**Laurel N. Huggins*
Print name beneath signature
*LAUREL N. HUGGINS**Robert T. Brin*ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0110950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES 12-31-1975

